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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-146

RUDOLPH SLAGLE, *et al.*,

Appellants,

v.

LUTHER PARKER, *et al.*,

Appellees.

APPEAL FROM THE
SUPREME COURT OF ALABAMA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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INTRODUCTION

The Appellants, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, oppose Appellees' motion to affirm the Alabama Supreme Court in the instant case and submit this brief in support of their opposition.

ARGUMENT

The Appellees' description of Appellants' due process argument is "the legislature cannot abolish a right to bring an action for wrongful death once that right has been granted." Motion to Dismiss, at 3. Appellees' description is inaccurate: Appellants' substantive due process argument is that Ala. Code Section 25-5-11 (1975) constitutes an arbitrary exercise of the police power of the State of Alabama. Of course, it has long been recognized that protection against the arbitrary exercise of governmental power is the very protection afforded by substantive due process concepts. *See, e.g., Hurtado v. California,* 110 U.S. 516, 532 (1884).

Under Section 25-5-11, a worker may sue co-employees who tortiously injure him, but if the worker's co-employees kill him, the deceased's dependents cannot sue those co-employees. Appellants contend this anomaly is an arbitrary exercise of governmental power and is prohibited by the Fourteenth Amendment's substantive due process guarantee. In presenting this argument, Appellants are not asking the Court to sit as a super-legislature and weigh or make value judgments on reasons for extending or not extending immunity depending upon whether an injured worker dies from the injury. Appellants, however, are asking the Court to recognize and condemn on substantive due process grounds the lack of any offered or conceivable reason or way that Section 25-5-11 could even be suggested as promoting the purpose of the Alabama Workmen's Compensation Act. In other words, Appellants are not saying that Section 25-5-11 is defective because its relationship to any legitimate end of the Workmen's Compensation Act is unreasonable or not rational; they are saying that it is defective because there is no

relationship between the contested feature of Section 25-5-11 and the object of Alabama's Workmen's Compensation Act.

Appellants agree with the proposition submitted by the Appellees that our Constitution does not prohibit a state from treating accidents which occur in the course of employment separately from all other accidents. This is due in part to the *sui generis* nature of our Workmen's Compensation Act. This general rule, however, is not applicable to the instant case. The situation existing in this case involves the grant of immunity for tortious acts causing death in work-related accidents, while not granting such immunity for the same tortious conduct which causes non-fatal injury in a work-related accident. That is to say, in both instances the accident occurred in the scope of employment. The flaw in the Appellees' position is that the discrimination occurs between work-related accidents, not separately from all other accidents.

Additionally, *Hawkins v. Bleakly,* 243 U.S. 210 (1916), cited by the Appellees in support of this argument, deals specifically with the relationship between an employer and an employee and nowhere discusses the viability of third party lawsuits. Fundamental to the Appellants' argument is the well recognized Alabama law that a co-employee is not an employer. *United States Fire Insurance Co. v. McCormick,* 286 Ala. 531, 243 So.2d 367 (1970); *Grantham v. Denke,* 359 So.2d 785 (Ala. 1978). In other words, Appellants concede the constitutionality of the provisions of the Alabama Workmen's Compensation Act dealing with the relationship between employers and employees. It is the immunization of third parties only when their wrongful

conduct causes the death of a worker, an aspect of the relationship between employees, that is attacked.

Appellees contend in their brief that the Appellants are not distinguished from other similarly situated individuals. Much is made of the proposition that suits must be maintained by dependents and not personal representatives as required by Alabama's death statute. It is submitted that this distinction is irrelevant. Nothing in Alabama law prohibits a dependent from being appointed the personal representative of a decedent's estate. In fact, in the instant case, Rudolph Slagle, one of the Appellants, is not a dependent. Additionally, our third party statute, Section 25-5-11, specifically provides that if there are no dependents, then the personal representative may sue.

It is important to note that the distribution of the proceeds recovered in third party actions is the same as in actions based on our wrongful death statute. *Sanders v. Shockley*, 468 F.2d 88 (5th Cir. 1972). That is, regardless of whether a wrongful death suit is brought under § 25-5-11 or under our Wrongful Death Act, distribution of the proceeds will be the same.

Appellees offer *Schloss v. Matteucci*, 260 F.2d 216 (10th Cir. 1958), as supportive of their position that it is constitutionally permissible for a statute to provide immunity in cases involving wrongful death when immunity is not granted in cases involving personal injury. For at least two reasons, this court of appeals case is not capable of supporting Appellees' argument.

Schloss v. Matteucci, supra, is not supportive of Appellees' position because it is materially different than and thus distinguishable from the case now before the Court. In *Schloss*, the agents of the subjects of the

enactment, air carriers, were regarded as the same as the air carriers with respect to the protection afforded by the Act. 200 F.2d at 17-18. Conversely, under Alabama Workmen's Compensation Act, the employer and employees are recognized as distinct and separate entities. Ala. Code § 25-5-11 (1975); *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978); *United States Fire Insurance Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367 (1970). Secondly, the act considered in *Schloss* did not immunize; it limited and assessed the liability of air carriers (and their agents) in death actions. *Id.* at 17. Unlike *Schloss*, in this case, the employer's limited liability in both personal injury and death situations does not extend to its agents, and Ala. Code Section 25-5-11 bars, and does not just limit, a dependent's recovery against co-employees.

Another reason the *Schloss* case is inapplicable here is because it fails to recognize what this Court has long recognized—the scope of the rights afforded an injured worker, or his or her dependents in the case of the worker's death, should be the same. As was stated by this Court in *Madera Sugar Pine Co. v. Industrial Accident Commission*, 262 U.S. 499, 67 L.Ed. 1091, 43 S.Ct. 604 (1923):

> Provision is universally made in workmen's compensation acts for compensation not only to disabled employees, but to the dependents of those whose injuries are fatal. And the two kinds of payment are "always regarded as component parts of a single system of rights and liabilities arising out of" the relation of employer and employee. . . . The object of such acts "is single,—to provide for the liability of the employer to make compensation for injuries received by an employee," whether

to the employee himself or to those who suffer pecuniary loss by reason of his death.

262 U.S. at 501, 67 L.Ed. at 1093, 43 S.Ct. at 605, *quoting Western Metal Supply Co. v. Pillsbury,* 172 Cal. 407, 416, 156 Pac. 491, and *Hayett v. Pennsylvania R. Co.,* 86 N.J.L. 683, 684, 92 A. 58.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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